In the Supreme Court of the United States

Civil Action No. 87-273

PARTMAR CORPORATION, PETITIONER

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARAMOUNT PICTURES, INC., ET AL., DEFENDANTS

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court, appellee United States of America moves that the order of the district court from which the appeal has been taken be affirmed.

This is an appeal from an order of the United States District Court for the Southern District of New York denying the above petitioner (appellant in the Supreme Court) leave to intervene in a civil proceeding brought by the United States under Section 4 of the Act of July 2, 1890, known as the Sherman Act, against Paramount Pictures, Inc., and seven other leading distributors of motion-picture films and certain of their subsidiaries. The application for leave to intervene was made and denied under the following circumstances:

The principal proceeding was instituted by the United States in July 1938. Various violations of the Sherman Act were charged and comprehensive relief was prayed. On November 20, 1940, a decree was entered by consent, establishing *inter alia* a trial period of three years for most of its provisions, against five of the defendant distributors—including Paramount Pictures, Inc.—and their defendant subsidiaries.

On August 7, 1944, the Government filed an application for modification of the consent decree. The answer of the consenting defendants denied any right to such relief and the case was set down for trial of all issues against all defendants. After the district court had entered a final judgment on December 31, 1946, all the defendants appealed from the judgment. The United States also appealed upon the ground that the relief granted by the judgment was inadequate.

On May 3, 1948, this Court affirmed the judgment below in part and reversed it in part, and remanded the cause to the district court for further proceedings in conformity with the Court's opinion. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131. The Court upheld the district court's findings as to defendant's violation of the Sherman Act and, on the question of relief, it affirmed many of the provisions of the district court's judgment. Other provisions of the judgment, however, were set aside upon the ground that they failed to give adequate relief.

On March 3, 1949, a decree was entered by consent against Paramount Pictures, Inc., and Paramount Film Distributing Corporation, which will be collectively referred to as Paramount. The

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consent decree contains elaborate provisions designed to achieve divorcement of Paramount's exhibition business from its production and distribution business. It provides for divestiture of a large number of Paramount's theatres and it imposes various injunctive prohibitions on Paramount and the business units into which it is to be split.

On the same day in which the consent decree was entered, the district court denied petitioner-appellant's application for leave to intervene. The petition for intervention set forth that petitioner had leased a theatre in Los Angeles, California, from Paramount and that Paramount had instituted eviction proceedings against petitioner in a court in Los Angeles. Although petitioner-appellant has set up as a defense in that suit that the eviction grew out of a violation of the anti-trust laws by Paramount, intervention in the present case was sought for the purpose of incorporating in the consent decree a provision prohibiting such eviction.

Jurisdiction of the appeal is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, and under Title 28, United States Code, Section 2101(b).

Petitioner-appellant is plainly not entitled to intervene as of right under Rule 24(a) of the Rules of Civil Procedure. No statute of the United States gives it an unconditional right to intervene; it is not bound by the consent decree; nor will any property in which it has an interest be "adversely affected" by the consent decree. See *Allen Calculators, Inc.* v. *National Cash Register Company*, 322 U.S. 137, 140-141. If petitioner has any claim

it is not that the consent decree will adversely affect rights which it asserts in connection with the theatre of which it is a lessee, but that the decree does not confer upon it new and additional rights. Furthermore, no provision of the consent decree gives petitioner-appellant a right of intervention. Cf., *Missouri-Kansas Pipe Line Company* v. *United States,* 312 U.S. 502.

No showing has been made that the Government's representation of the general interests of independent exhibitors has been inadequate. The gravamen of petitioner-appellant's complaint is that the consent decree does not affirmatively bar Paramount from evicting it. But the proper forum for determining the equities of the respective parties in the eviction proceeding is the court in Los Angeles where that proceeding is pending. The possibility that the petitioner may have grounds for an action in damages under the antitrust laws or a suit for reformation of its franchise and lease "grants no privilege . . . to intervene in suits under the Sherman Act brought by the United States." *Allen Calculators* case, at page 141. Furthermore, it is highly questionable whether the claim of the proposed intervenor and the main action "have a question of law or fact in common" within the meaning of Rule 24(b).

It is equally clear that the action of the district court in denying permissive intervention was not an abuse of discretion constituting reversible error. Rule 24(b) provides that the court, in exercising its discretion in passing upon intervention, shall consider whether intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." The most important relief

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granted by the consent decree is the divorcement of Paramount's distribution business from its exhibition business. To have permitted exhibitors injured by Paramount to interject themselves into the proceedings for the purpose of litigating private damage claims might have prevented this or any other decree by consent. As the district court observed in connection with the application for intervention: "There have been a great many representations that people might be affected, and they might be affected. We can't provide for all these outside litigations. There would never be any consent decree . . ." These considerations alone plainly bring the matter within the area of the court's discretion.

There is also no substance to petitioner's assertion that it was entitled to intervene to prove that the consent decree did not carry out the mandate of this Court. The mandate opened many broad avenues of relief, but it did not require that all should be pushed to their ultimate limits. The Government accepted the decree against Paramount in the belief that securing definitely the relief provided by the decree would be of greater benefit to the industry as a whole than risking the uncertainties and delays incident to bringing every relief issue to trial. Acceptance of the decree represented an exercise of judgment such as is called for at almost every stage in the prosecution of a civil proceeding under the antitrust laws.

In considering whether the district court's order denying intervention constituted an abuse of discretion, the position respecting intervention taken by the Government, which bears direct responsibility for enforcement of the statute, is cer-

tainly a material consideration. In the *Allen Calculators* case denial of intervention was held not to be an abuse of discretion although the Government had supported intervention in the district court. *A fortiori,* there was no abuse of discretion under all the circumstances of the present case, including the fact that the Government opposed the application to intervene. It supported petitioner-appellant's right to be heard with respect to its claim that the consent decree might prejudice its position in the Los Angeles litigation, but denied that any such prejudice could occur and opposed its application to become a party to this litigation.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is therefore respectfully submitted that the order of the district court denying intervention should be affirmed.

(S.) PHILIP B. PERLMAN,
Solicitor General.

APRIL 1949.

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